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ADMINISTRATIVE law has now taken its place in our society as one of the major fields of law. It is the branch of the law of public administration which is concerned with the powers of administrative agencies to determine, by prescription or decision, private rights and obligations.[1] Its development began as early as when men sought protection of their individual and collective rights. Many techniques and devices have been used in the attempt to establish and protect these rights.

Regulating procedure is the essence of modern administrative law, but one cannot with certainty identify its origins. It is often said to have begun with the Interstate Commerce Commission in 1885, but it began long before.[2] Public awareness of administrative law in its modern connotation grew after World War I in the late 1920's and early 1930's. With the advent of the New Deal administration of President Franklin Delano Roosevelt, many new administrative agencies were created in the federal system, extending government regulation into many new areas.

Administration of legislative programs impels administrative agencies, boards, and commissions to make decisions in diverse situations. In the framework of experience but within the law enacted by the legislative body, the administrator determines the facts logically relative and necessary to a decision and makes his decision by applying to those facts rules of law promulgated by the legislature. The deter-

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[1] 2 CAL. JUR. 2d *Administrative Law and Procedure* § 3 (1952). There are nearly as many definitions of administrative law as there are writers in jurisprudence or public administration. See PROCEEDINGS OF THE STATE BAR OF CALIFORNIA 314 (1941); PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION 339 (1938).

[2] REPORT, ATTORNEY GENERAL'S COMMITTEE, S. Doc. No. 8, 77th Cong., 1st Sess. 7 (1941); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); GELLHORN & BYSE, ADMINISTRATIVE LAW 3-7 (1954); see ROBSON, JUSTICE AND ADMINISTRATIVE LAW 18-19 (1951).

mination of relative facts and the application of rules of law thereto is in essence the performance of a judicial function. This has traditionally been within the province of the courts. However, the administrator must act and in so doing he performs a judicial function. The onrush of events forces decisions, and the need for action may often be more impelling than perfect adaptation of the agency doing the job.[3]

The administrator may find that the legislative body has not provided detailed rules to cover a situation presented for solution. Some statutes contain specific delegation to the administrator of the power to implement, interpret, or make more specific the general area of legislative direction. No legislature can anticipate all possible applications of a statute establishing a new program. If not delegated, an implied power arises from the necessity for such implementing rules. The administrator must consider whether the facts come within the ambit of the legislative program. He must interpret the legislative words and apply them to the facts in order to administer effectively.[4]

Generally, if administrative action relates to past conduct of those affected by it, it is adjudicatory; if the effect is prospective, the action is legislative.[5] In the exercise of an administrative authority, therefore, one finds adaptations of judicial and legislative techniques and procedures.

The executive issues orders or takes action affecting the rights of people. If those rights are affected adversely or unfavorably, the act of the administrator-bureaucrat may be challenged by those affected. This has sometimes been by direct petition to the legislature, often by negotiation with the administrator, or finally by an appeal to a court for the application of judicial sanctions to restrain or to correct the exercise of executive power as it applies to the petitioning party.

While an administrator may sincerely try to balance conflicting interests, an advocate should seek to prevail for his principal. If unsuccessful, he may and often is tempted to assert arbitrariness. Sometimes administrators become zealous advocates of a specific social purpose or objective.[6] If one affected by such action is aggrieved, his

[3] BAILEY, ETHICS AND THE POLITICIAN 4, 7. The correlative is the thesis of many writers in administrative law, to let that instrumentality perform the function which is best able. See DAVIS, ADMINISTRATIVE LAW § 1.05 (1959).

[4] See FIFTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 3 (1955); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: The High Road,* 35 TEXAS L. REV. 62 (1956); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: The Low Road,* 38 TEXAS L. REV. 392, 572 (1960).

[5] There are other tests to disclose the nature of administrative action. It is not always easy to determine whether the agency is administrating or exercising powers of legislation or adjudication.

[6] See note 3 *supra.*

traditional remedy is the court. Much of modern administrative law has evolved from decisions in which private rights are balanced against new social philosophies exercised by the administrative agencies for the benefit of the public good.

The court on judicial review decides whether the administrator has exceeded the power delegated through legislative enactment. But how does one secure judicial action? What is the proper writ by which to petition the court in order to secure relief? What is the extent or scope of review? Are there constitutional limitations? What is the rule of law? Here are the principal areas in which administrative law has developed.

In the long struggle to protect private rights, the organized bar has continued to urge respect for the traditional concepts of separation of powers and of due process in the activity of the vast and rapidly growing bureaucracy of administrative agencies.[7] Concern of the bar regarding the number, size, authority and scope of these agencies coupled with the chaotic state of their rules and practices, led to extensive studies to determine whether these agency rules and regulations were properly adopted, what they are, and where and how they can be found and examined in order to comply with them or to test their validity. As a result of these studies, the bar has been actively seeking ways to reasonably curb, restrain, or direct the rule-making and adjudication powers of the administrator.

The American Bar Association first established a special committee (later a section) on administrative law in 1933.[8] It began and still continues to study and to urge what it believes will be constructive and beneficial improvements in administrative law. One result of the studies of the committee was the Federal Register Act of 1935, which tended to formalize regulations by providing for publication of implementing rules and regulations of federal administrative agencies in an available form.[9] The California bar, through its committee on administration of justice, contributed in a measure to this activity of the American bar.[10] In fact, the activity of the various state bars, including that of California, led the American bar to establish in 1942 a sub-

[7] See note 2 *supra.*

[8] Known as the Special Committee on the Practice of Law. See HISTORY OF THE A.B.A. 102 (1936), seeking uniformity, separation of judicial and prosecutor functions, due process, and an administrative court. It also studied the scope of judicial review. See also VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 454-94 (1949).

[9] Federal Register Act of 1935, 49 Stat. 500 (1935).

[10] See PROCEEDINGS OF THE STATE BAR OF CALIFORNIA 138 (1942) for report of committee including comment on condition of administrative rules; *Committee Activities of the State Bar,* 13 CAL. S. BAR J. 53 (Mar. 1938).

committee on "State Administrative Law," recognizing the fact that various states were evolving significant principles of administrative law.[11] State bar associations, too, were challenging the power of administrative agencies.

It was soon evident from studies conducted by members of the state bar that the rules and regulations of California agencies were in a state of considerable confusion and uncertainty. The bar undertook to study the proceedings of several selected administrative agencies in California.[12] This study revealed that there was no single repository or file for administrative regulations, even within the agencies themselves. Thus advocates appearing before agencies had the impression that there often were no rules except those made up by the administrator as he went along. They were picked off, as the phrase goes, from the top of his head or from under a desk blotter or counter. The importance or application of so-called "house rules" consequently were unknown to a client until he was confronted with them. The bar urged that the rules be accumulated for study and that filing and publication be required so that they could be known and made available. To further this end, the bar offered its services to assist any administrative agency in drafting, revision, compilation, and publication of its regulations. This led to the creation of the Codification Board in 1941.

For years relief from action of administrative agencies had been sought by writ of certiorari. This had always been sufficient to accomplish judicial review.[13] Then, in 1936, the Supreme Court of California in *Standard Oil Co. v. Board of Equalization*[14] reversed history and led to confusion in the minds of counsel and of the courts. To the surprise of his brethren on the bench and of counsel representing both litigants in the case, it was suggested by one member that certiorari might not be available.[15] When the question was raised it was briefed by both sides in support of the writ. Yet a divided court accepted the

[11] In PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION 219, 632 (1938) the Committee on Administrative Agencies and Tribunals reports inclusion of a study of state administrative law.

[12] Ultimately, because of lack of time and staff, the study was limited to the licensing function. TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 9, 10, (1944).

[13] This was not always free from doubt. See Balter, *Use of Certiorari to Review Decisions of Administrative Bodies*, 14 CAL. S. BAR J. 220 (July 1939); see also *Selected Essays Submitted in 1939 Ross Essay Contest*, A.B.A.J. 453, 543, 770, 838, 940, 1018 (1939).

[14] 6 Cal. 2d 557, 59 P.2d 119 (1936).

[15] There seems to have been an unusually large number of such petitions, and the court may have wanted some relief, McGovney, *Administrative Decisions and Court Review Thereof, in California*, 29 CALIF. L. REV. 110 (1941).

view of the innovator. Traditionally, the writ was used to review the decision of an inferior judicial body.[16] The court held that, under the strict doctrine of separation of powers, administrative agencies are not courts within the meaning of the California constitution. Since they cannot exercise judicial powers, certiorari is not available. All pending writs for such review were thereupon dismissed. The state bar received this decision with consternation.[17]

What then was the proper writ? What was the scope of review? How may one secure proper and necessary relief from administrative action, or if not relief, a forum to determine the validity of the action? In 1937, Resolution No. 3 was presented at the meeting of the California bar to do something about this confusing situation.[18] It was adopted and referred to a special committee to be coordinated with another committee then working on ways to solve the problem of uncertainty of administrative rules and regulations.[19]

In 1938[20] the state bar committee on administrative law proposed legislation to require a separation, within administrative agencies, of the judicial from the investigatory and prosecution functions, to require adoption and publication of administrative rules, to require that hearings be in the county of residence or where the transaction occurred, and to require a constitutional amendment relating to the nature and scope of judicial review[21] in light of the decision in the *Standard Oil* case. A proposed amendment was drafted for adoption.

In the 1939 session of the California Legislature, Senator T. H. DeLap introduced such a senate constitutional amendment, which was adopted (chapter 119) and submitted to a vote of the people as Proposition No. 6 on the November 1940 ballot. It would have added as section 5a of article VI of the constitution a provision authorizing the legislature to prescribe "Judicial Review of the Acts of Administrative Bodies" since "there is now no way to review such acts."[22] The propo-

[16] CAL. CODE CIV. PROC. §§ 1067-77.

[17] Probably no California case has caused more comment.

[18] PROCEEDINGS OF THE STATE BAR OF CALIFORNIA 138, 204, 370 (1939).

[19] The A.B.A. also continued its study of administrative uniform rules of practice, PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION 214, 219 (1937).

[20] PROCEEDINGS OF THE STATE BAR OF CALIFORNIA 83, 93, 200, 235 (1939).

[21] *Id.* at 370, report of Special Committee on Assembly Bill 471 (Sess. 1939) proposing to do something about the review of administrative action. Bill 471 was introduced but was not enacted.

[22] Rowland, *Our Legislative Program,* 14 CAL. S. BAR J. 57 (1939); Peters, *Review of Administrative Board Rulings Limited to Writ of Mandate,* 14 CAL. S. BAR J. 313 (Feb. 1939).

sition was defeated on November 5, 1940 by a narrow margin.[23] Assembly Bill 2881 in the 1939 Session might have started action on administrative regulations, but it did not pass.

Meanwhile, the *Standard Oil* case was followed by *Whitten v. Board of Optometry*[24] which held that the writ of prohibition also was not available for appellate judicial review of administrative action. In this decision, however, it was suggested that perhaps mandamus might be available as a remedy.

In 1939, one Drummey was aggrieved by a decision of the Board of Funeral Directors and Embalmers.[25] Petitioner's counsel ingeniously pleaded for review 1) by writ of mandate, 2) by writ of prohibition, 3) by certiorari, and 4) for general relief under one of the ancient maxims of the law reflected in our Civil Code that there is no wrong without a remedy.[26]

The district court of appeals in a learned opinion by Justice Spence indicated that a modified mandamus was an appropriate remedy even though not traditionally so. It was thought that mandamus directed to the administrators' discretion was appropriate inasmuch as statewide agencies could not exercise judicial powers, but that this writ would reach their "purely administrative decisions." This was unrealistic because the decisions being tested were unquestionably judicial in nature.[27]

With the *Drummey* case, a writ became available, but its scope of review of administrative decisions was uncertain. This did not deter the state bar from again urging that a constitutional amendment was necessary in order to give the legislature power to prescribe the writ and the scope of review.[28]

At this point there was confusion in administrative rules of procedure. There was no judicial review, since the first try for a constitutional amendment was lost. However, there was not frustration but renewed determination.

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[23] Ryan, *Two State Bar Sponsored Amendments to be on November 5 Election Ballot,* 15 CAL. S. BAR J. 294 (Oct. 1940); *Problem of Review for Administrative Boards and Bureaus Remains Unsolved,* 15 CAL. S. BAR J. 377 (Dec. 1940). Thus, it was said that the problem remained unsolved. But there was hope. The Congress had adopted the Logan-Walter Bill to establish an Administrative Procedure Act, then waiting the signature of the President. See also PROCEEDINGS OF THE STATE BAR OF CALIFORNIA 153, 182, 211 (1940).

[24] 8 Cal. 2d 444, 65 P.2d 848 (1939).

[25] Drummey v. State Bd. of Funeral Directors, 13 Cal. 2d 75, 87 P.2d 848 (1939).

[26] CAL. CIV. CODE § 3523.

[27] See DAVIS, ADMINISTRATIVE LAW §§ 23.09-.12, 24.03 (1959).

[28] See note 23 *supra.*

In 1941, Senators Kenny, Rich and DeLap introduced Senate Bill 1007 which became Chapter 1190 of the 1941 California Session Laws. This bill authorized and directed the Judicial Council to study the entire problem.[29] A proposed appropriation in the original bill was stricken before its enactment, which left the Judicial Council no alternative than to postpone the proposed study "because no funds were provided for the necessary technical staff to carry out this substantial task." There were seeds of doubt as to whether the Judicial Council was the proper body to make such studies which might extend beyond the nature and scope of judicial review.[30] It was concluded that procedural rules of each agency were essential to resolve the problem, as distinguished from interpretative rules that implement the delegated authority of the agency.

The Office of the Department of Justice, legislative committees, and the state bar were now actively attempting to create some order out of the chaos then apparent in California. The legislature had created a codification board in 1941 to do something about codifying and publishing the then effective administrative regulations.[31] An appropriation of 70,000 dollars was provided in 1943 by chapter 1060. The codification board began to function and appointed Hugh B. Bradford as its executive secretary. This board, with the active cooperation and assistance of Governor Warren, the attorney general and the state bar, caused all of the selected agencies to file their regulations. Opportunities were to be afforded all of the agencies to revise their regulations and to consider whether the many miscellaneous regulations filed, not filed, or misfiled within each organization were those which it desired to be published as its existing regulations.

Many agencies then revised and adopted regulations to become effective. This was real progress. Some agencies periodically undertook extensive revision, adoption, repeal, and amendment of regulations. That foundation enabled California to develop a method of publication that has been a model for other states.[32]

Again in 1941 a constitutional amendment was proposed to author-

[29] NINTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 5 & n.13 (1942).

[30] This was reflected in *Reports of the State Bar* and in a staff memo # 1404, March 4, 1941, to Fred Wood, Legislative Counsel. *Query:* Is the Judicial Council the one to do the job, *i.e.*, examine the files of the Council if the agencies do not co-operate? See NINETEENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 54-55 (1963).

[31] CAL. POL. CODE §§ 720-25.4 (1941).

[32] In Wisconsin, the California plan was adopted not as mere coincidence but because it was thought to be the best, SIXTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 9 (1957).

ize legislation to clarify the nature and scope of judicial review.[33]

In the reports of the state bar committee for the years 1941-1942 and 1942-1943, the then chairman, Harry J. McClean,[34] reviewed the continuing work on rules and regulations drawn by his committee in co-operation with various agencies and the attorney general's office and concluded that in order to properly exercise its powers in light of the rights of affected people, an administrative agency should have uniform rules of procedure and be required to utilize trained hearing officers to conduct the proceedings in which judicial power was exercised and judicial techniques were used. His committee recommended that proposed decisions be subjected to observation, comment and exception by the interested parties before the agency made its final decision.[35]

Meanwhile the supreme court had decided the case of *Laisne v. California State Bd. of Optometry*.[36] While mandamus might be the available remedy, the court declared that the scope of review was in effect a new trial of all the issues. The result was that no activity of the administrator could be considered final, and the court would consider de novo the entire issue which had been resolved by the administrative agency. The district court of appeal decided this case April 19, 1940. The court revised the opinion while denying rehearing. The supreme court granted a hearing and decided the case March 16, 1942 and refused to reconsider. Chief Justice Gibson dissented with Justices Edmonds and Traynor concurring.

Although it had worked diligently to secure a more complete review of administrative action, the state bar committee then observed that in light of the *Laisne* decision any proposal to extend the scope of judicial review had become a moot question.[37] This was vigorously argued. Scholars and theorists urged that the case was an "enormity," "fantastic" and "unrealistic," and that the constitutional amendment

[33] This was Senate Constitutional Amendment 8, Cal. Stat. 1941, ch. 142, p. 3549, which was proposition 16 on the ballot. See McGovney, *Administrative Decisions and Court Review Thereof*, 29 CALIF. L. REV. 110 (1941).

[34] PROCEEDINGS OF THE STATE BAR OF CALIFORNIA 15, 66, 312-65 (1941).

[35] The suggestion regarding an independent hearing officer may have been stimulated by the military courts. It was discussed by the Commonwealth Club. See Administrative Procedure Act, CAL. GOV. CODE § 11517(b) as amended in 1955; see also Dami v. Department of Alcoholic Beverage Control, 176 Cal. App. 2d 144, 1 Cal. Rptr. 213 (1959).

[36] 19 Cal. 2d 831, 123 P.2d 457 (1942).

[37] *Committee on Administrative Agencies and Tribunals 1941-1942*, 18 CAL. S. BAR J. 422-70 (1943). An excerpt from the U.S. Attorney General's committee report to Congress and to the President was appended to this report, relating to the hearing officer concept, which was now growing in California thinking.

was still needed.[38] The second proposed constitutional amendment was lost on November 3, 1942, probably because the state bar withdrew its support of the measure.

Now the American Bar Association and several state bar associations were drafting a proposed Uniform Administrative Procedure Act to be recommended by the National Conference of Commissioners on Uniform State Laws, under the supervision of Professor E. Blythe Stason of the University of Michigan. The proposed Uniform Administrative Procedure Act was also presented to the California Bar for comment and discussion. Its comments were sent to the Commissioners.

Action was beginning in California. Studies and recommendations continued, and in 1943 there was introduced into the California Legislature a new bill[39] which again directed the Judicial Council to make studies. An appropriation was included. Now the project could go forward, and it did. This was discussed at a conference of the state bar[40] in San Francisco. It was upon this occasion that Governor Warren, who had so enthusiastically and effectively encouraged and supported the program, reported his great satisfaction in signing the bills to finance the publication of administrative regulations and to cause the study to be made. Shortly thereafter, Chief Justice Gibson of the supreme court, as Chairman of the California Judicial Council, appointed a subcommittee consisting of Judges Nourse, Goodell and Dooling to conduct the study. Ralph N. Kleps of the San Francisco Bar was appointed director of the research staff. After organizing this research staff, Gibson called a conference in San Francisco on October 1, 1943. The conference was attended by representatives of the Department of Justice, several state agencies, and the state bar. Others present were Percy C. Heckendorf, Director of the Department of Professional and Vocational Standards, and B. E. Witkin, eminent authority on California law.[41] At the first meeting, the general outline of the intended study was presented and comments were invited from those present and participating. Thereafter, many meetings and conferences with twenty-one agencies were held. The work continued by the research staff.

[38] See Turrentine, *For: The Laisne Case—A Strange Chapter in Our State Jurisprudence*, 17 CAL. S. BAR J. 165-72 (1942). *But see* Bianchi, *Against: The Case Against S.C.A. No. 8, id.* at 172.

[39] Assembly Bill 1917 introduced by Johnson which became Cal. Stat. 1943, ch. 991, p. 2903. See *Committee on Administrative Agencies and Tribunals*, 20 CAL. S. BAR J. 198 (1945).

[40] In lieu of a convention as a war measure on Sept. 16, 1943. See Warren, *The Gauntlet of His Own Profession*, 18 CAL. S. BAR J. 222 (1944).

[41] See *Report of Committee on Administrative Agencies and Tribunals* 19 CAL. S. BAR J. 284 (1944).

On April 1, 1944, the first report was made to the Judicial Council. The staff reported that its studies included the law, the authority under the law related to all of the California agencies, their rules and regulations, and California court decisions. It included references to the work and studies which had been done by the United States Attorney General's Committee,[42] in New York,[43] Ohio, Illinois, North Dakota, Minnesota, Pennsylvania, and North Carolina. Questionnaires had been sent to all of the California agencies, including a request for rules, forms, references to applicable statutes, court decisions, and actual practices of each agency. Hearings were continued throughout the latter part of 1943 and early 1944.

Participation of a qualified and trained hearing officer to guide the agencies within the legal limitations and pursuant to basic concepts of due process in the quasi-judicial activities of these agencies emerged as a need, and was recommended. Limitation of time, staff, and funds to the Judicial Council led to recommendations that certain constitutionally created agencies such as the Public Utilities Commission (then the Railroad Commission) and the Industrial Accident Commission be excluded from any immediately proposed legislation.[44] It was determined that adoption and publication of rules of procedure and the nature and scope of judicial control were the two most important subjects. It was also recommended that legislative action be limited, for the time, to the licensing functions of agencies regulating businesses and professions.

Drafts of the proposed report to the full council were made available and those interested were invited to comment.[45] The report proposals related to formal discipline of agencies subject to legislative control, thus further narrowing the area in which effective legislation could be anticipated. A proposed act was outlined, the organizational structure to be created for providing qualified hearing officers was presented, and the nature and scope of judicial review described. Some of Governor Warren's specific suggestions were incorporated in the final legislation.[46] Under date of December 31, 1944 the complete

[42] See note 2 *supra.*

[43] The famous and splendid report by Robert J. Benjamin on Administrative Adjudication to the Governor of New York (1942).

[44] See CAL. GOV. CODE §11445.

[45] A total of 400 copies with 200 copies of an appendix were widely distributed. See *Report of State Bar Committee,* SPECIAL BULLETIN (Sept.-Oct. 1944). The proposals of the Judicial Council then being formulated were described with an indication of the probable scope of the final report.

[46] See notes of P. C. Heckendorf, Nov. 21, 1944 (State Archives).

and final report of the Judicial Council was presented,[47] with the necessary proposed legislation.

The proceedings of the 1945 session of the legislature saw the introduction of a series of bills to carry out this program. Bills to enact these recommendations in the Senate were sponsored primarily by Senator T. H. DeLap.[48] These bills prescribed the procedural requirements for the exercise by administrative agencies of judicial power, established the Division of Administrative Procedure, appropriated $195,000 to finance the operation for the balance of the fiscal year from the effective date, and included a series of bills relating to the basic statutes of the agencies so that they would come within the Act procedurally. Section 1094.5 was added to the Code of Civil Procedure defining the nature and scope of the writ of mandate for judicial review of administrative decisions. These all became law.

The state bar, the Judicial Council, the Governor, and devoted legislators all contributed substantially to the success of this program. Senator DeLap who was the author of most of the Senate bills and Assemblyman Harrison W. Call, Chairman of the Assembly Judicial Committee, were largely responsible for the successful progress of these bills. The bills were signed on the 15th of June, 1945, to become effective the 15th of September that year. A report of the enactment of this pioneer program appeared in the California State Bar Journal.[49] The Administrative Procedures Act was generally hailed as one of the finest examples of this sort of state legislation. During the debates on the Senate Bill to create a Federal Administrative Procedure Act[50] then pending before the Federal Congress, Congressman Johnson of California reported with some pride the success of California in its program to secure an Administrative Procedure Act.[51]

In its 11th Biennial Report,[52] the California Judicial Council reported the survey, the success of its study, and the enactment of the Administrative Procedure Act in 1945. The success of this program indicates that carefully considered legislation on technical subjects

[47] TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA, (1944). See Kleps, *California's Approach to Improvement of Administrative Procedure*, 32 CALIF. L. REV. 416 (1944).

[48] Senate Bills 705-42 (1945). For a discussion of the various codes affected, see Kleps, *Report on the Reform of Administrative Procedure*, 20 CAL. S. BAR J. 124, 125 (1945).

[49] Kleps, *supra*, note 48; *Committee on Administrative Agencies & Tribunals*, 20 CAL. S. BAR J. 198 (1945).

[50] S. 7, 79th Cong., 2d Sess. (1946), later the Federal Administrative Procedure Act, 5 U.S.C. §§ 1001-11 (1946). See note 2 *supra*.

[51] 92 CONG. REC. 5662 (1946).

[52] ELEVENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 11 (1946).

by qualified persons with an awareness of the problems and of the background is the most effective way to accomplish remedial reforms. It was stated that the Act had already been so well received that it had become a model to a degree for fourteen other states and observed that California was "the first to establish an agency specifically charged with the improvement of administrative procedure."

California is still the only American jurisdiction in which a separate organizational structure has been created with a centralized staff or pool of qualified hearing officers and which is also charged with the responsibility of making continuing studies for the improvement of the administrative process. Some of the fruitage of this part of the program was the result of the co-ordination of the work of many toward a modern system to publish administrative regulations.[53]

Originally, the Division of Administrative Procedure was established in the Department of Professional and Vocational Standards.[54] Ralph N. Kleps, who had headed the research staff for the Judicial Council, was appointed the first Chief of the Division. Implementation of the Act proceeded rapidly. Letters were sent to all agencies affected, advising them of the impact of the new law and that it would become effective on September 15th, 1945.[55] Suggestions were requested and recommendations were made as to how to comply with the statute by that time. Civil service examinations were announced to secure the necessary and properly qualified persons to act as hearing officers.[56]

Further progress was reported by the state bar[57] on the draft of a proposed code of ethics. This also had been urged by Governor Warren. Professor Max Radin of the University of California was employed by the state bar to prepare a preliminary draft. Various meetings were then held by members of the state bar committee with Professor Radin and others. In August a proposal was sent to the Director of the Department of Professional and Vocational Standards with the request that it be transmitted to the Governor. As a matter of fact, the Gov-

[53] FIRST BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE (1947). See VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 454 (1949), proposing a model state act.

[54] CAL. BUS. & PROF. CODE § 110.5.

[55] Letter from Percy C. Heckendorf, Director of Dept. of Professional and Vocational Standards, August 20, 1945; DIVISION OF ADMINISTRATIVE PROCEDURE, BULLETIN 9 (1945).

[56] Heckendorf, *An Opportunity for the Profession*, 20 CAL. S. BAR J. 418 (1945), quoted Earl Warren and reported the assistance of the committee in preparation of examinations and staffing.

[57] *Report of Committee on Administrative Agencies & Tribunals*, 21 CAL. S. BAR J. 162 (1946). See also PROCEEDINGS OF THE STATE BAR OF CALIFORNIA 184 (1946).

ernor revised the draft resulting from this work of the consultant and the committees of the bar and in August 1948 promulgated the first state "Code of Ethics for Government Officials." While this was done by executive pronouncement, the problem of ethical conduct of administrative agencies and relations between them and the public is still a matter of concern. Bills to accomplish such a code were presented to Congress in 1959[58] and subsequent years. Conflict of interest statutes have been offered in each session of the California Legislature in recent years.

An Assembly interim committee had been working on administrative regulations. Reports were filed early in the 1947 session of the California Legislature.[59] Legislation was introduced and enacted in that session pursuant to which the organization, function, responsibilities, and staff of the codification board, which had been compiling, revising, editing, and publishing the rules of administrative agencies, were transferred to the Division of Administrative Procedure.[60]

California now had a statutory program of recognized merit with adequate procedural steps required to be taken by administrative agencies in California in the exercise of delegated or implied legislative and judicial powers. But this is not the end.

While this crusade was going on, the California courts were still grinding out decisions reflecting the attempts of petitioners on behalf of clients with grievances to find ways in which to test effectively the activity of administrative agencies. Only a brief summary is given here of that which has been well presented by several learned writers such as Witkin, Kleps, McGovney, Turrentine, Netterville, Elliott and others.[61]

[58] S. 2374, 86th Cong., 1st Sess. (1959). Agency Hearing Standards of Conduct Act and H.R. 10657, 86th Cong., 2d Sess. (1960). See EIGHTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 12, 13 (1961).

[59] Assemblyman Don Allen was the Chairman (see note 2 *supra*). See ASSEMBLY JOURNAL 1288-1303 (Feb. 3, 1947), and a supplement to the report at 4913-38 (June 19, 1947), by Fred Wood, Legislative Counsel.

[60] This was chapter 4, and is a companion to chapter 5 (adjudication) of Title 2, Division 3, Part 1 in the California Government Code, which together were known as the Administrative Procedure Act. In 1961, substantial amendments rearranged the Act into three chapters: 4, 4.5, and 5.

[61] Certiorarified mandamus: 3 WITKIN, CALIFORNIA PROCEDURE *Extraordinary Writs* § 16 (1954); Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions 1949-1959*, 12 STAN. L. REV. 554 (1960); Netterville, *The "Independent Judgment" Anomaly*, 44 CALIF. L. REV. 262 (1956); Netterville, *Administrative "Questions of Law" and the Scope of Judicial Review in California*, 29 SO. CAL. L. REV. 434 (1956); Netterville, *The Substantial Evidence Rule in California Administrative Law*, 8 STAN. L. REV. 563 (1956); Kleps, *Certiorarified Mandamus; Court Review of the California Administrative Decisions 1939-1949*, 2 STAN. L. REV. 285 (1950); McGovney, *Administrative Decisions and Court Review Thereof, in California*, 29 CALIF. L. REV. 110 (1941).

The courts have continued to codify, expand, qualify, and expound the judicial concept of the nature and scope of judicial review. It would seem they have not accepted completely that which was thought to have been accomplished by this legislative reform and the revision of the Code of Civil Procedure. The trial de novo which the *Laisne* case expounded is probably rejected now and yet upon occasion a judge will still speak of a trial de novo. Whether its independent review 1) should be limited to the evidence in the record before the administrative agency, 2) should receive additional evidence, or 3) should remand to the agency for further evidence has not been finally decided.

The Division in its First Biennial Report in 1947 contributed substantial information to the legislature for its consideration of the recommendations of its Assembly interim committee, under chairman Don Allen, resulting in substantial changes in the law in 1947 already mentioned. Also an extended study was made by the Chief of the Division during the next biennium for the reorganization of the Unemployment Insurance Appeals Board and clarification of procedure before it. The recommendations in this extensive and learned report were largely adopted and resulted in improvement of the procedure before that agency.[62]

In evaluating the success of this reform program and whether it has fulfilled the expectation of those responsible for it, one must consider other phases of the operation. There are several. One relates to staff and personnel. The nature of this program is such that a highly skilled staff of hearing personnel is required. To attract and retain such personnel the highest salaries in the classified service should be paid. The law so indicated.[63] The State Personnel Board has never accepted this concept. Almost immediately after the enactment of the law in 1945, when the salary of the Division hearing officers was placed, as directed, at the top of the salary ranges of those civil service personnel performing such functions, the State Personnel Board began revisions of the salary ranges of all other persons in hearing and referee classes so that by 1947 the salary of the hearing officers of the Division of Administrative Procedure, rather than being at the top of the salary

[62] SECOND BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 17 (1949).

[63] The reasons were stated in the TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 13-15 (1944). The courts have declared that this is the legislative history and reference to it may be made to determine legislative intent, Brock v. Superior Court, 109 Cal. App. 2d 594, 241 P.2d 283 (1952); Hohreiter v. Garrison, 81 Cal. App. 2d 384, 184 P.2d 323 (1947). See most recent summary of this in EIGHTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE (1961). This subject was again emphasized in the NINETEENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 56-57 (1963).

ranges, was on a parity with the lowest salaries in this series.[64] Unfortunately, this salary relationship continues. No action was taken to revise the specifications until July 5, 1962. This did not create the new class of hearing officers as requested. The revision did not result in correction of the salary disparity. The office[65] reclassified three of its Grade I hearing officers to Grade II and reassigned some duties. This had the effect of increasing the renumeration of those persons who were reclassified.

Legislation was proposed,[66] but no bills were introduced. However, Senator Edwin J. Regan, Chairman of the Senate Judiciary Committee, on May 31, 1963, introduced Senate Concurrent Resolution No. 73. It was not adopted in that session, but was reintroduced in the later first extraordinary session, 1963, as Senate Concurrent Resolution No. 1, and adopted.[67] A somewhat similar Senate Concurrent Resolution No. 64 was adopted in 1959,[68] but it had no effect.

Continued effort of and on behalf of the office caused the State Personnel Board to employ private counsel[69] to "study the relationships between the classes of Legal Examiner, Hearing Officer and Referee."[70] While this is hopeful, the hearing officers do not fully participate in the general salary increase as of January 1, 1964, and the salary inequity within the hearing officer series (and vis-a-vis other legal classes) continues.

A serious consequence of the salary disparity is that other agencies, such as the State Personnel Board itself and the Industrial Accident Commission, can and do entice good men from the Office of Administrative Procedure at the substantially higher salaries paid in those agencies.

Another interesting commentary on this program relates to budgeting and appropriation of funds for support. It seemed to be clear in the Judicial Council report and in the statute itself[71] that this program,

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[64] See PROCEEDINGS OF CALIFORNIA STATE BAR 247 (1949).

[65] Title changed Sept. 15, when the Office of Administrative Procedure was established in the Department of Finance, and all staff and functions of the Department of Administrative Procedure of the Department of Professional and Vocational Standards were transferred to it.

[66] EIGHTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 19-24 (1961); NINTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 24 (1963).

[67] SENATE JOURNAL, FIRST EXTRAORDINARY SESSION 56 (July 16, 1963).

[68] See NINTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 13 (1963).

[69] Frank K. Richardson, former President of Sacramento Bar Association.

[70] THE CALIFORNIA STATE EMPLOYEE 4 (Dec. 15, 1963).

[71] TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 14 (1944); CAL. BUS. & PROF. CODE § 110.5; see letter from Percy C. Heckendorf to Beach Vasey, Governor Warren's Secretary, Oct. 5, 1944 (State Archives).

conceived to be a part of the administration of justice in the State of California, would, like the courts, receive general fund revenues for partial support of this activity. It was also understood, as it must be, that a portion of this cost of the program would be made a charge for the services rendered to the specific agencies using the service.[72] At its inception this was done. It was uncertain what portion of the cost of this program could be anticipated as reimbursible from the agencies by which the services would be used and to whom these interagency charges would be made. The reimbursements increased substantially from year to year. However, representatives of the Department of Finance continually urged that a higher quota of reimbursements should be established. The Division budgeted the amount necessary for its support to carry on the program; estimated reimbursements to be expected, and requested appropriation from the general fund of the difference between the need and the estimated recovery. The estimated reimbursements were revised upward by the Department of Finance to the end that the direct appropriation from general fund revenues was decreased substantially for each year. This resulted in retrenchment of the program and necessitated frequent petitions for supplementary appropriations, often in the nature of emergencies, when the operations of the Division did not in fact result in recovery of the arbitrarily high estimates imposed by the budget division of the Department of Finance.

Then followed an interesting episode. Surveys were made by the Department of Finance seeking a method and a basis upon which to insist upon and require a higher recovery.[73] The insistence on a 75 per cent recovery proposed in a second survey illustrated the danger to the program and precipitated a different approach. In transmittal to the Department of Professional and Vocational Standards,[74] it was pointed out that to follow the recommendations would jeopardize the existence of the Division. An agreement was finally reached in the latter part of 1954 to request a formal opinion of the attorney general as to whether the proposals were within the legislative intent. The attorney general's opinion[75] said that the proposals were not within the meaning intended by the legislature.

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[72] CAL. GOV. CODE § 11250-335, (see § 11263 as to expenses); see STATE ADMINISTRATIVE MANUAL 9570.

[73] Actual reimbursements increased from 27% of the total budget during the first year of the operation of the Division to in excess of 58%. The Department of Finance continued to insist that the recovery should be more, from 65%, to 75%, to 100%.

[74] Letter of T. H. Mugford of the Department of Finance to the Director of the Department of Professional and Vocational Standards, Dec. 15, 1954.

[75] 24 OPS. CAL. ATT'Y GEN. 221 (1954).

The Department of Finance caused to be introduced in the 1955 session of the legislature a Senate bill[76] proposing that the Division be made self-supporting. To do so the Division was to be required to make charges to the using agencies of a proportion of the non-identifiable and overhead costs of the Division. When the motivation and effect of the proposed legislation was explained to the subcommittee, the bill was tabled.[77]

Once more, in 1959, without consultation with the Division of Administrative Procedure or with the Department of Professional and Vocational Standards, the Department of Finance changed the proposed budget of the Division for the year 1959-60 to require 100 per cent support of the Division through reimbursements. No appropriation was made for the support of this function from general fund revenues. In the printed budget, a footnote indicated that such reimbursements will be accomplished by anticipated legislation.

Again, without consulting the Division or the Department of Professional and Vocational Standards, the Department of Finance caused to be introduced a bill in the 1959 session of the legislature to add section 110.7 to the Business and Professions Code, which would make the Division completely self-supporting.[78] The Director of the Department of Professional and Vocational Standards was able to persuade the Department of Finance to accept some amendments to the original bill. The section then provided for an estimate to be made by the Department of Finance to be certified to the Board of Control as to the amounts to be charged in the current year to each of the agencies which had used the Division of Administrative Procedure services during the preceding fiscal year. This money was to be transferred to the Division for its support. This eliminated the necessity of periodically requesting piecemeal or emergency appropriations to meet the payroll and other expenses of the Division. Another amendment provided that the "allocation" of this cost to the agencies would be *equitably* adjusted at the close of each year based upon the experience during such year.

This "fiscal" amendment abandons the concept that the hearing program of the Division of Administrative Procedure is a part of the administration of justice and properly a general fund responsibility. A second and serious effect is that the very substantial increase of the

[76] Senate Bill 755 (1955).

[77] This struggle was described in Doctoral Thesis #4184, Library, University of California at Berkeley: Alexander, *The Issuance and Revocation of Occupational and Professional Licenses.*

[78] Senate Bill 560 (1959) proposed new CAL. BUS. & PROF. CODE § 110.7 to require 100% recovery of budget need of Division of Administrative Procedure.

"allocations," thereby charging all of the support for the Division to the using agencies, stimulated the avoidance or evasion of the use of the services of the Division of Administrative Procedure by agencies otherwise disposed to use it. Both results are regressive and unfortunate, if not unwise.[79]

Included in a series of articles published in the Los Angeles Examiner[80] criticizing the activity of many of the licensing agencies, Vincent S. Dalsimer, the then Director of the Department of Professional and Vocational Standards, was quoted as advancing proposals to remedy the alleged abuses. He pointed out the significance in the entire program of discipline of licensees and other regulatory duties of these administrative agencies and the work of the Division of Administrative Procedure in maintaining compliance with basic concepts of due process. An agency should use qualified, objective persons to determine adversary matters, and an adequate record should be made to support the decision and be available for appropriate judicial scrutiny and review. The last news article reported that Governor Brown had agreed with the philosophy and would consider legislation to restore general fund support to the Division, to strengthen the program by requiring independent Division of Administrative Procedure hearing officers and allowing no agency staff hearing officers in hearings under the Administrative Procedure Act, and to transfer the Division of Administrative Procedure from the Department of Professional and Vocational Standards to some service agency.[81]

This was done. Bills introduced in the Assembly resulted in legislation.[82] An Office of Administrative Procedure was established in the Department of Finance, to which was transferred not only all the functions of the former Division but all other hearing officers and personnel employed by other agencies who performed functions under the adjudication provisions of the Administrative Procedure Act.[83] The executive officer responsible for the program, designated as the Presiding Officer, was to be appointed by the Governor subject to confirmation by the Senate, and is the appointing officer for the staff personnel of the Office. The changes continue the provisions for financial support of the Office along with the study and research of adminis-

[79] *But see* the present CAL. GOV. CODE § 11370.4.

[80] Aug. 12, 26, 27, 28, 1960.

[81] See EIGHTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE (1961) on proposed change.

[82] Assembly Bills 1614-16 (1961) reflected some of the proposals of those bills. See Brown, *Reorganization of State Government*, ASSEMBLY JOURNAL 744-46 (Feb. 14, 1961); NINTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 9 (1963).

[83] CAL. GOV. CODE §§ 11370.2-.3, 11502.

trative law and procedure. In further implementation of Governor Brown's program of governmental reorganization, the Office was placed in the Department of General Services as of October 1, 1963.[84]

During the years since the original enactment of this statute, other changes have been made. In each statute creating new regulatory powers in the licensing field, the legislature generally includes a provision that disciplinary procedure follow the Administrative Procedure Act. In some legislation the procedural requirements of this Act have been applied to other than strictly licensing functions. Some outstanding examples were the oil subsidence regulation requirements of the Division of Oil and Gas, determination of the existence of water pollution as a basis for abatement of the causes,[85] and procedures to determine whether unfair unemployment practices occurred or exist.[86] The Rumford Fair Housing Act extended the authority of the Unfair Practices Commission to the field of housing.[87] Minor changes have been made with respect to continuances,[88] service of the decision,[89] and in 1963 as to pleading and procedure relating to a showing of mitigation.[90]

For several years[91] the Senate interim committee on administrative rules and regulations was concerned with the exercise of secondary legislative power. Interpretation of the definition of "regulation" and practices of the agencies was made the subject of extensive studies by this interim committee. Its reports and recommendations resulted in the enactment of more specific references to provisions of law respecting the procedural steps, publication of notice of intention, and filing and publication requirements respecting regulations adopted by an agency.[92]

Another matter of concern to the legislature was what was thought to be a method of avoiding publicity by adopting regulations as emergencies. Thus in 1957, the legislature enacted an amendment to the

[84] CAL. GOV. CODE § 11370.2.

[85] Since repealed as it was thought to be a procedure not feasible in that field.

[86] CAL. LABOR CODE §§ 1410-12.

[87] CAL. HEALTH & S. CODE §§ 35700-44; membership in the Commission was increased to seven, CAL. LABOR CODE § 1414.

[88] CAL. GOV. CODE § 11524.

[89] CAL. GOV. CODE § 11517; see also Dami v. Department of Alcoholic Beverage Control, 176 Cal. App. 2d 144, 1 Cal. Rptr. 213 (1959).

[90] Other proposed amendments may be found in the several biennial reports of the Division of Administrative Procedure and in the reports of legislative committees.

[91] 1952-1959.

[92] CAL. GOV. CODE § 11371 was amended in 1949 and again in 1957 to exclude forms. See REPORTS OF THE SENATE COMMITTEE ON ADMINISTRATIVE REGULATIONS for 1952, 1953, 1955, 1957, and 1959.

rule-making provisions of the Act[93] providing that if a regulation be adopted and filed as an emergency, it would remain effective for no more than 120 days unless prior to adoption or within that 120 days the adopting agency shall have published proper public notice and afforded opportunity for those interested to make their views known. Then upon filing a certificate of compliance with said procedural provisions of the law, the emergency regulations could become permanently effective.

Perhaps one of the most significant amendments was in respect to the requirement of publicity of the intention to exercise secondary legislative power. Here too is an indication of the continued interest and concern of the legislature in the rule-making activities of agencies. During the 1959 legislative session, amendments were enacted[94] requiring that all agencies file with the rules committee of the State Senate and of the Assembly a copy of the notice of intended or proposed adoption, repeal or amendment of any regulation implementing a statute. Also, the law presently requires[95] that copies of the actual regulation, amendment, or repeal filed through the Office of Administrative Procedure shall likewise reach the rules committee of both the Senate and Assembly. This will alert the legislature to intended action of administrators and inform it of what in fact occurred.[96]

The legislature, in its joint rules committee, has established a medium whereby this information can be communicated to the chairmen of the various committees of both houses and to the members thereof. The publication with an analysis by the legislative counsel of the material filed is now distributed throughout the legislature and to others who are interested.

Other recommendations have been advanced from time to time by the state bar[97] in comments of legal writers, and in the biennial reports of the Office of Administrative Procedure suggesting how to better define the area of administrative action, to improve administrative procedure, and to restrain excesses or abuses in the exercise of administrative powers. For example, there have been recommendations that the proposed decision of the hearing officer be made final.[98] Some assert

[93] CAL. GOV. CODE § 11421.

[94] CAL. GOV. CODE § 11422.1.

[95] CAL. GOV. CODE § 11380.

[96] The Congress also has a special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce.

[97] Senate Bill 255 (1959), to make Public Utility Commission hearings conform to basic concepts of the Administrative Procedure Act, lost; Senate Bill 688 (1959), salaries of hearing officers, lost; and then S.C.R. 64 was adopted.

[98] Senate Bill 1600 (1957) not enacted; EIGHTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE (1961).

that this is undesirable because it would give a civil service employee power to make decisions binding an administrator. It has been suggested that decisions be made by the administrator without the intervention of a qualified, objective, and "quasi-independent" hearing officer and that the petitioner seeking relief go directly to the courts. However, abuses in this practice in the past led to the enactment of this program, and rather than revert to the old program with a probable increased load in the courts, it has been suggested that there be created special administrative courts.[99] Many authorities believe that a constitutional amendment would be required to accomplish such a fundamental change.

The record of performance and the interest of those proposing changes which strengthen or weaken this program by substitution of something thought to be an improvement are the materials from which the future history of the California Administrative Procedure Act will evolve.

The nature of governmental action being described in the constitution, in initiative measures, by the legislature, and in administrative practices and regulations which affect so many different interests in society, suggests that the hope of one uniform procedure within the agencies and for judicial review is not to be expected in the near future. This Act will probably be extended to (as it has now been adapted to) other proceedings than those to which it was originally limited when adopted in 1945.[100] While the uniform application of the Act is not presently feasible, a more careful study and classification of the kinds of situations in which administrative power is exercised and its impact upon the rights of persons may suggest areas in which the minimal provisions for procedure outlined in the California Act may properly be applied.

[99] Assembly Bills 3177 (1955) and 3574 (1957).

[100] See OFFICE OF ADMINISTRATIVE PROCEDURE, BULLETIN 5 pp. 3-5 (May-Aug. 1963).